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IN THE

# Supreme Court of the United States

October Term, 1955

No. 852.

DAVID S. ALBERTS,

*Appellant,*

*vs.*

STATE OF CALIFORNIA,

*Respondent.*

## Brief in Opposition to Motion to Dismiss or Affirm.

Appellee moves to dismiss the appeal or affirm the judgment below on the grounds that

(1) The appeal does not present a substantial federal question; and

(2) The judgment rests on an adequate non-federal ground.

Appellee's motion is without merit.

## I.

## The Appeal Presents Substantial Questions.

**A. Appellant's Assertion That Penal Code Section 311, Proscribing Obscene Books, Is so Vague and Indefinite in Form and as Interpreted as to Permit Within Its Scope the Punishment of Incidents Fairly Within the Protection of the Guarantee of Free Speech and Press in Violation of the First and Fourteenth Amendments, Presents a Substantial Question.**

Appellee in its motion (p. 4) argues that the question is not substantial for the reason that this Court has in effect already upheld the validity of like statutes against constitutional attack. The cases cited by appellee do not support this proposition: *Rosen v. United States* (1896), 161 U. S. 29; *United States v. Dennet* (1930), 39 F. 2d 564; *Bonica v. Oleson* (1954), 126 Fed. Supp. 398; *United States v. Limehouse* (1932), 285 U. S. 424.

While *Rosen v. United States, supra,* and *United States v. Limehouse, supra,* dealt with a federal statute relating to mailing obscene matter they did not consider in any way the constitutional questions posed by this appeal. In *United States v. Dennet, supra,* it was held that the book there involved was *not* obscene, the circuit court saying by way of dictum that there was no question as to the constitutionality of the act. In *Bonica v. Olesen, supra,* the district court held that the films there involved were not obscene. No constitutional question was decided. These cases certainly do not put to rest the important constitutional questions raised in this appeal.

In appellant's jurisdictional statement (pp. 21-22) we argued that the appeal in the instant case presents a substantial question since it raises much the same question posed in *Butler v. Michigan*, probable jurisdiction noted. In answer to appellant's argument appellee states in its motion (p. 11):

> "There is no merit to appellant's contention. There is nothing in the Wepplo case, *supra*, or in any other California cases cited, that can be fairly construed as holding that:
>
> "'The Michigan and California statutes, as interpreted are strikingly similar.' [Jur. Stat. p. 21.]"

Appellee has failed to grasp appellant's reference to *People v. Wepplo*, 78 Cal. App. 2d (Supp.) 59. The *Wepplo* case, *supra*, was cited to show that the California statute as interpreted *was* strikingly similar to the Michigan statute under consideration in *Butler v. Michigan*, *supra*.

California Penal Code, Section 311(3) as interpreted by *People v. Wepplo*, *supra*, reads:

> "Every person who . . . keeps for sale . . . any obscene or indecent . . . book . . . which has a substantial tendency to . . . corrupt its readers by . . . arousing lustful desires is guilty of a misdemeanor."

The Michigan statute (M. S. A. 28.575) provides:

> "Any person who shall . . . possess with the intent to sell . . . any book . . . containing obscene, immoral, lewd or lascivious language . . . manifestly tending to the corruption of the morals of youth is guilty of a misdemeanor."

It is perfectly plain, whether a California case has so stated or not, that the Michigan and California statutes as interpreted are similar, and present in part the same important constitutional questions.

**B. Appellant's Assertion That He Was Convicted Because He Mailed Circulars Advertising Books Which Were Held to be Obscene and Because He Kept Those Books for Sale by Mail Presents a Substantial Question.**

As we have shown (Jurisdictional Statement pp. 8, 25), the statute *as applied* reached and punished activities which were part and parcel of a mail order business. Appellee seems to argue that because the State statute does not on its face mention mailing, it does not infringe upon a federal power (appellee's motion pp. 15 to 17). The law is otherwise. In *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 82, the Court held that a purchase in Kentucky for transportation to Tennessee was interstate commerce and that the state law which would validly apply to intrastate commerce was unconstitutional as applied to interstate commerce. This Court there said that interstate commerce is not confined to transportation from one state to another but "comprehends all commercial intercourse between different states and *all the component parts of that intercourse.*" (Emphasis added.)

It is plain that keeping books for mailing constitutes using the mails just as buying locally for transportation to another state constitutes interstate commerce. See also *Leisy v. Hardin*, 135 U. S. 100; *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148.

II.

**The Judgment Rests on Federal Grounds.**

In its motion (p. 18) appellee suggests that the judgment "might" have rested upon a non-federal ground. What this non-federal ground "might" be is not disclosed. The Appellate Department considered appellant's argument that the statute on its face and as applied violated the federal constitution, and held against appellant saying:

> "The words 'obscene or indecent' as used in subdivision 3 of section 311, are not unconstitutionally indefinite. As early as 1896 the United States Supreme Court knew their meaning. Swearingen v. U. S., 1896, 161 U. S. 446, 451, 16 S. Ct. 562, 40 L. Ed. 765, 766, and a large number of cases since then have been decided on the theory that their meaning was not obscure. See Annotation, 76 A. L. R. 1099, and People v. Wepplo, 1947, 78 Cal. App. 2d Supp. 959, 961, 178 P. 2d 853, 855. To be sure, it is not always easy to decide on which side of the line a book should be placed, . . ." (Jurisdictional Statement, Appendix A, pp. 2-3.)

Likewise the Appellate Department considered and ruled against appellant's argument that since he was convicted for using the mails the state law was superseded by applicable federal law:

> "The circumstance that the defendant made use of the United States mails to advertise and to distribute his obscene wares . . . does not render the state statute, section 311, inoperative. See in re Phoedovius, 1918, 177 Cal. 238, 246, 170 P. 412; Zinn v. State, 1908, 88 Ark. 273, 114 S. W. 227, 228; *Ex parte* Williams, 1940, 345 Mo. 1121, 139 S. W. 2d

485, 491, which cites In re Phoedovius, *supra*, certiorari denied in U. S. Supreme Court, Williams v. Golden, 311 U. S. 675, 61 S. Ct. 42, 85 L. Ed. 434; Railway Mail Assn. v. Corsi, 1945, 326 U. S. 88, 95, 65 S. Ct. 1483, 89 L. Ed. 2072, 2077." (Jurisdictional Statement, Appendix A, p. 3.)

The law is plain that if the state court bases its decision upon a determination of a federal question, the argument will not be heard, in an attempt to defeat the jurisdiction of this Court, that the state court *might* have based its decision upon an independent and adequate non-federal ground (*Grayson v. Harris*, 267 U. S. 352, 358; *Virginia v. Imperial Coal Sales Co.*, 293 U. S. 15, 16-17; *International Steel and Iron Co. v. National Surety Co.*, 297 U. S. 657, 666; *Indiana ex rel. Anderson v. Brand*, 303 U. S. 95, 98; *Steele v. Louisville and N. R. Co.*, 323 U. S. 192, 197, n. 1).

The foregoing answers the points raised in appellee's motion. Our jurisdictional statement shows that important federal constitutional questions were raised and decided adversely to appellant by the state court and that controlling cases of this Court strongly suggest that the state court was in error. Further argument properly awaits hearing on the merits. Appellee's motion to dismiss or affirm should be denied.

Respectfully submitted,

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